

TANZANIA / JUDGMENT

Criminal Appeal No15914 of 2024 plea of guilty

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1 January 2024

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA ARUSHA SUB REGISTRY AT
ARUSHA CRIMINAL APPEAL NO. 15914 OF 2024 (C/f the District Court of Ngorongoro at Loiiondo
in Criminal Case No. 15 of2025) SHEDRACK SAITOTI
MAALIMU.....APPELLANT VERSUS THE
REPUBLIC..... RESPONDENT

JUDGMENT

24h & 25h March 2025 Masara, J Shedrack Saitoti Maalimu, the Appellant herein, stood charged of Unnatural Offence, contrary to section 154(l)(a) and (2) of the Penal Code, Cap. 16 [R.E 2022] at the District Court of Ngorongoro at Loiiondo ("the trial court") in Criminal Case No. 15 of 2023. He was convicted on what was held to be an unequivocal plea of guilty and consequently sentenced to serve life imprisonment. According to the Prosecution's facts constituting the offence, on 14th day of September 2023, at Sakala Village within Ngorongoro District in Arusha Region, the Appellant did have carnal knowledge against the order of the nature with a girl aged 7 years, whose identity is concealed in this Appeal in order to safeguard the dignity of the child. She shall hereinafter be referred to as ML or the Victim. 1 | Page On 19th September 2023, when the Appellant was arraigned at the trial court, and after the charge was read over to him, he entered a plea of guilty. According to the records of the trial court, after a plea of guilty was entered, the Prosecution read over facts constituting the charge against the Appellant whereupon the Appellant purportedly admitted all of them, including the fact that he had carnal knowledge against the order of nature with the victim. On the basis of that admission, the trial court proceeded to convict and sentence the Appellant as above stated. Dissatisfied with the conviction and sentence the Appellant appealed to this Court armed with ten grounds of appeal couched as follows: 1) That, the learned trial magistrate erred in law and facts in not finding that the prosecution side failed to disclose and establish all elements of the offence charged.

- 2) That, the learned trial magistrate erred in law and facts in not finding that, the appellant was not reminded his charge before conducting the preliminary hearing.
- 3) That, the trial court erred in law and facts in not finding that, there was variance on the date alleged to be committed of the said offence.

- 4) That, the trial court erred in law and facts in failing to note that, prosecution side failed to summon material witness (young boy) who reported the matter to the victim's mother (PW1). 2 | Page
- 5) That, the trial court erred in law and in facts in not observing that PW2(victim) failed to name the suspect (appellant) at the earliest opportunity.
- 6) That, the trial court erred in law and facts in not finding that there was contradiction between the evidence of PW1 and PW2.
- 7) That, the trial court erred in law and in facts in convicting and sentencing the appellant in a poorly investigated case as there was no police investigator.
- 8) That, the trial court erred in law and in fact in not seeing that the prosecution side failed to issue arresting order (RB) to verify how the appellant was apprehended and connected with the said allegation.
- 9) That, the trial court erred in law and fact when convicted and sentenced the appellant while the case was not proved to the required standard of laws.
- 10) That, the trial court erred in law and in facts in failing to consider the appellant's defence. When the appeal was called in for hearing, the Appellant appeared in person with no legal representation, while Mr Philbert Msuya, learned State Attorney, appeared for the Respondent Republic. The appeal was heard through filing of written submissions and both parties filed their respective submissions as per the order of the Court. 3 | Page In his submissions, the Appellant dealt with all the grounds of appeal generally. He stated that, before conducting the preliminary hearing, he was not reminded of his charge contrary to the provisions of section 192(3) of the Criminal Procedure Act, Cap, 20 [~R-E 2022] (hereinafter, "the CPA"). That, such failure led him to plead guilty of the charge without understanding the consequences of the said plea. The Appellant added that the trial court erred when on 26/09/2023 it ordered facts to be read and admitted the caution statement and the PF3 (exhibits P1 and P2) without giving the Appellant a chance to object to the said exhibits. Further, that the Appellant mitigated that he had sickness of losing memory and that he had no any previous records of conviction as reflected at page 9 of the typed proceedings; but the trial court accorded no weight to that defence contrary to Article 15 of the Constitution of the United Republic of Tanzania ("the Constitution"). It is the Appellant's assertion that everyone has the right to be heard. That, the act of the trial court to ignore the Appellant's defence prejudiced his rights as stipulated in Article 13(6)(a) of the Constitution. In reply, Mr Msuya strongly opposed the Appeal and supported the conviction and sentence imposed on the Appellant by the trial court. In his view, as the Appellant was convicted following his own plea of guilty, 4 | Page he can only appeal against the extent of and or the legality of the sentence imposed on him, as per section 360(1) of the CPA. To support his submission, reference was made to the case of Laurence Mpinga vs Republic [1983] TLR 166 and section 228(1) and (2) of the CPA. Mr Msuya further argued that, sections 228 and 360(1) of the CPA stipulate that there cannot be an appeal on a conviction and sentence arising

from a plea of guilty. That, the Appellant has not established and convinced this Court that his plea was equivocal. He added that the Appellant's plea was perfect and clear and the charge sheet well informed the Appellant of the ingredients of the offence levelled against him, as is required by section 154(1)(a) and (2) of the Penal Code. Mr Msuya added that, even when the facts of the case were read over to the Appellant, he responded to each set of the facts clearly, indicating that he understood the nature of the charge facing him. Responding to the ground that the Appellant was not reminded of his charge before the commencement of the preliminary hearing, Mr Msuya contended that the said ground of appeal is misconceived, as on the same date that the Appellant pleaded guilty, facts constituting the offence were read over to him. That, the trial court adjourned the matter to 26th 5 | Page September 2023 for reading of the findings of the court. For that reason, there was no room for the trial court to remind the Appellant of the charge in terms of section 228(2) of the CPA. Despite supporting the decision arrived at by the trial court, Mr Msuya conceded to the fact that the trial court erred by adopting the procedure of a plea of not guilty under section 192(3) of the CPA. He pointed out that, after the plea of guilty was entered, the right procedure would have been the one stipulated by section 228(2) of the CPA. However, according to Mr Msuya, the said anomaly does not vitiate the proceedings of the trial court. He thus prayed that the said ground be dismissed. Regarding the claim that the Appellant was denied the right to object to the tendered exhibits, Mr Msuya responded that the said exhibits were tendered by the Public Prosecutor on the same date the Appellant pleaded guilty and no objection was raised against them; hence, the said exhibits were admitted uncontested, he added. He referred this Court to pages 5 and 6 of the trial court typed proceedings. On the claim that the Appellants' defence was not considered, Mr Msuya responded that there was no such defence as no full trial was conducted before the trial court to enable the Appellant to enter a defence. He added 6 | Page that, what is said to be a defence was a statement given during mitigation for the purposes of reducing sentence. Further, such mitigation could not be entertained as the offence against which he was convicted of carries only a minimum sentence, which is life imprisonment. About the issue raised in the first ground of appeal, Mr Msuya submitted that the charge sheet laid against the Appellant disclosed all the elements of the offence; to wit, that the Appellant had carnal knowledge with the victim, aged 7 years, against the order of nature. Replying to the issue that there existed variance on the date of the commission of the offence, it is Mr Msuya's contention that the alleged variance does not exist as the date mentioned in the charge sheet is the same date that is mentioned at pages 2 and 3 of the typed proceedings of the trial court. Contesting the claim that the prosecution failed to summon a material witness, Mr Msuya responded that, as no full trial was conducted, there was no need for the Prosecution to summon such or any witnesses, as the Appellant pleaded guilty to the offence. With regard to failure of the victim to name the accused person on the earliest opportunity, Mr Msuya reproduced the facts of the case and stated 7 | Page that on the same date and nearly the same hours of the commission of the offence, the victim named the Appellant to her mother as the person who defiled her. On the grounds that there were contradictions of evidences of PW1 and PW2 and on the failure to summon the police officer who investigated

the offence, Mr Msuya submitted that the said evidence is not within the court file as no full trial was conducted. Responding to the allegation that the case against the Appellant was not proved to the required standards, Mr Msuya submitted that, the facts adduced by the Prosecution disclosed all the ingredients of the offence. He made reference to this Court's decision in *Onesmo Alex Ngimba vs Republic*, Criminal Appeal No. 157 of 2019 [2022] TZCA 26 (16th February, 2022 Tanzlii) and the Court of Appeal decision in *Sostenes John vs Republic*, Criminal Appeal No. 184 of 2014) [2015] TZCA 301 (13th February 2015 Tanzlii). Basing on the submissions made, the Respondent prayed that the Appeal be dismissed in its entirety. Having carefully considered the trial court records, all the grounds of appeal and the submissions made in support of and against the appeal, 8 | Page the issue to determine in this Appeal is whether the appeal herein has merit. To answer the issue above, I find it apt to start encapsulate the position of law with regards to appeals against conviction arising from a plea of guilty. Section 360(1) of CPA curtails appeals against conviction where such convictions arise from an accused's own plea of guilty. For easy of reference, I hereunder reproduce the said provision: "No appeal shall be allowed in the case of any accused person who has pleaded guilty and has been convicted of such plea by a subordinate court except as to the extent or legality of the sentence." Notwithstanding the wordings in the above provision of the law, an appeal against conviction is and can be allowed where it is shown that the plea of guilty was equivocal. The Court of appeal in the case of *Laurence Mpinga vs Republic* [1983] TLR 66 held that: "An accused person who had been convicted by any court of an offence on his own plea of guilty may appeal against the conviction to the higher court on the following grounds;

- a) That taking into consideration the admitted facts his plea was imperfect, ambiguous or unfinished and for that reason, the lower court erred in law in treating it as a plea of guilty;
- b) That he pleaded guilty as a result of mistake or misapprehension; 9 | Page
- c) That the charge laid at his door disclosed an offence not known to law; and
- d) That upon the admitted facts, he could not in law have been convicted of the offence charged/" Again, section 228(2) of the CPA directs the manner in which the accused person is called upon to plead to the charge. It states: "If the accused person admits the truth of the charge, his admission shall be recorded as nearly as possible in the words he uses and the magistrate shall convict him and pass sentence upon or make an order against him, unless there appears to be sufficient cause to the contrary/" It is important to note that an unequivocal plea of guilty is constituted of two important or mandatory ingredients; namely, one, the accused must plead to the charge and two, the accused must plead to the facts constituting the offence charged. In the Appeal under consideration, the first ingredient of pleading to the charge is not in dispute. I say so because the trial court records reveal that after the accused person pleaded guilty to the charge whereby the trial court recorded a plea of guilty, the trial court proceeded to conduct a Preliminary Hearing (PH) under section 192(3) of the CPA. 10 | Page That procedure was flawed. Ordinarily, the prosecution side was duty bound to narrate facts of the case constituting the offence to which the Appellant

pleaded guilty on. The trial court was not supposed to proceed to determine the disputed and undisputed facts by way of a PH. In his written submissions, the learned State Attorney conceded to the fact that the trial court erred by adopting the procedure of a plea of not guilty as per section 192(3) of the CPA, instead of proceeding under section 228(2) of the CPA. He, however, argued that the said anomaly does not vitiate the proceedings. It is important to reiterate that the obligation of the Prosecution in circumstances where an accused person pleads guilty to the charge is to adduce facts to support the charge to which the accused is required to either admit or deny. The Court of Appeal of Tanzania in the case of Michael Adrian Chaki vs Republic, (Criminal Appeal No. 399 of

2019) [2021] TZCA 454 (9 September 2021) reminded the State Attorney on the importance of the whole process of narrating facts after a plea of guilty is recorded. It stated: "Ordinarily, once a crime is reported at the police station, the police would investigate the matter and secure witnesses. Then, it will arrest the suspect and arraign him in court to answer the charge. Witnesses will be called to testify in court so as to prove the accusations laid in 11 | P a g e the charge. In a situation where the accused admits the allegations in the charge, it is deep rooted and invariable practice that the responsibility is on the prosecution to state facts establishing the allegations in the charge. In short, a plea of guilty relieves the prosecution the burden of calling witnesses to prove the charge but it does not relieve them from narrating facts correctly, clearly and sufficient enough to support the offence charged [see Salehe Mohamed v. R (supra)]. Actually, the facts narrated are in Heu of the otherwise evidence that the prosecution would be required to lead in court by calling witnesses so as to prove the charge beyond reasonable d96^f.,zfEmphasis made) While I am in agreement with the learned State Attorney that the trial court erred in adopting a wrong procedure after a plea of guilty was entered, I do not share his conclusion that the irregularity was minor and ought to be disregarded by this Court. The trial court's records, specifically at page 4 of the typed proceedings, reveal that, when the accused was asked to respond to the facts narrated by the Prosecution, he is recorded to have stated that: "AH the facts tendered by the prosecution side are very true and correct." Obviously, the said statement does not amount to a plea of guilty. It is merely a confirmation that the tendered facts by the prosecution were true and correct. It is imperative to note that some of the facts contained 12 | P a g e in the Prosecution statement could not be said to have been in the Appellant's own knowledge. Facts contained in paragraphs 9, 10, 11 and 12 of the said PH statement, to the effect that the accused was arrested, taken to a police station, yet while in custody the victim was taken to a police station and given a PF3, later on she was taken to the hospital and an investigation conducted on her; further, that while at the police station the victim's pink panties which had marks of faeces were taken, meaning that when the penis was inserted in her anus faeces came out, cannot be held to have been in the knowledge of the Appellant to enable him to plead as he did. In this Court's view, other than the accused hearing the said facts in court, there is nothing on record to suggest that the accused had prior knowledge of what transpired to the victim and what evidence was collected after he was arrested and detained at the police station. It is against the above circumstance that

this Court feels that the procedure adopted both by the trial court and the Prosecution highly diminishes any conclusion that the Appellant unequivocally pleaded guilty to the charge laid against him. Conducting a Preliminary Hearing instead of proceeding under the normal procedure following a plea of guilty marred the whole plea. A person cannot plea guilty to an offence and then be subjected to the procedure that apply to a plea of not guilty. If the trial Court was mindful to consider the Appellants plea as equivocal, then it should have marked it as a plea of not guilty and proceed with the trial. Failure to abide with the procedure; that is, since facts essential to substantiate the plea of guilty to the offence were not read over to the Appellant, then the plea of guilty entered cannot be said to have been unequivocal upon which to ground a valid conviction. Consequently, the proceedings, conviction and sentence of the trial court are hereby nullified, quashed and set aside. The original trial court file is to be remitted back to the District Court of Ngorongoro at Longido for a trial de novo. Meanwhile, the Appellant shall remain detained as a remand prisoner pending trial. DATED and DELIVERED at ARUSHA this 28th March 2025. Y.B. Masara JUDGE 14 | Page

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Prepared on 13 October 2026 · Esheria